No. 20789

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUMBERMENS MUTUAL CASUALTY COMPANY, an Illinois Corporation, and WALDORF-HOERNER PAPER PRODUCTS COMPANY, a Montana Corporation,
Plaintiffs and Appellants

— vs. —

BABCOCK & WILCOX COMPANY, a New Jersey Corporation, and CLARAGE FAN COMPANY, a Michigan Corporation,
Defendants and Appellees

Appeal from the United States District Court for the District of Montana, Missoula, Montana

BRIEF OF APPELLEES

Babcock & Wilcox Company
Clarage Fan Company

Appearances:

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STATEMENT OF THE CASE

Appellants' Statement of the Case is argumentative and fragmentary and hardly suffices to explain the issue here presented.

In December of 1959, Babcock & Wilcox (hereinafter called B&W) contracted with Waldorf-Hoerner Paper Products Company (hereinafter called Waldorf) to install at its Missoula plant a "power boiler" referred to by the parties as "PFI-2799" and also to duplicate an existing "recovery boiler" which the parties often referred to as "No. 2 Recovery" or the contract number "PR-58." The recovery boiler involves a high capacity induced draft (See: Sandberg Dep. pp. 20-21; Mourer, Tr. Vol. II, pp. 4-5), and the defendant and appellee, Clarage, was the manufacturer of the large fan sold to B&W and installed between the boiler and the stack to produce this draft.

The units were installed and commenced operation about October 1, 1960. Thereafter the power boiler had a number of tube failures which resulted in spirited controversy at least so far as Mr. Sandberg, Waldorf's president, was concerned. The power boiler is not involved in the suit but the controversy is highly material as to the type of thing the parties later "settled."

On March 30, 1961, and some six months

after operation commenced, the large induced draft fan did fail, disabling the operation, however there is abolutely nothing in the record that it "spun apart" as appellants' counsel states in their "chronological history" (Brief, p. 6). The I. D. fan (and there is only one) again broke down on October 28th, 1961. Subsequently, Lumbermens Mutual Casualty Company came into the picture and, as the insurance carrier for Waldorf, paid it money for the fan outages. When this occurred, or what type of insurance is involved, we do not know. While appellants now contend that the "settlement" of September 11, 1962 questioned by this appeal destroyed "Lumbermen's right without its representation" there is no suggestion in the pleadings or in the proof that the representatives of B&W had any knowledge or any notice of Lumbermen's rights or claimed subrogation.

Although the units had been in operation since the fall of 1960, Waldorf and Sandberg were at least dragging their feet on making payment under the contracts to furnish and install the units. Prior to March 27, 1962 there was nearly $85,000.00 still unpaid (Adamek's letter, Ex. "B", Sandberg Dep., p. 44). B&W had been trying to collect for about a year and a half and had a non-productive meeting to that end in

March of 1962 (Mourer Tr., Vol. II, pp. 8-10). In March Adamek and Mourer "had a nice visit" and went through the plant but accomplished no more because Sandberg didn't have his figures together that he wanted to talk about (Adamek Dep., p. 10, lines 11-25). In a nutshell, what it came down to was that Mr. Sandberg just wasn't going to pay B&W its retention until he was paid for the things he had coming (Countryman, Tr., Vol. II, p. 68 lines 17-23; Mourer, id. p. 11, lines 9-22). In his letter of March 27, 1962 (Ex. "B", Sandberg Dep., p. 44) Adamek, who was sales manager for B&W, sought a meeting the first part of April. There followed a series of correspondence between Adamek and Sandberg which finally terminated in a firm commitment for a meeting on August 28, 1962. That correspondence will be referred to later and is found in Sandberg's Deposition as Exhibits B through I, inclusive, from pages 44-51.

The parties met in Missoula—Waldorf was represented by Sandberg, its President, and Countryman, who was then its Production Manager; B&W, by Adamek, its Sales Manager; and Mourer, its Denver District Service Engineer. Sandberg still didn't have his figures but it was agreed that as of that time Waldorf still owed $25,576.00. There was no real attempt to nego-

tiate on the 28th and on the 29th the parties had accomplished nothing after several hours of attempting to get together item by item. Adamek then took the bull by the horns and, after a whispered consultation with Mourer, turned to Sandberg and offered to settle on a lump-sum basis by just splitting the $25,576.00. This was acceptable to Sandberg and the meeting broke up in all good fellowship. Thereafter, each party made its own breakdown of specifics for accounting purposes. On September 7, 1962, Sandberg wrote the critical and controlling letter to Adamek (Ex. 1, App. Appellant's Brief, pp. 29-30), making specific reference to the No. 2 I.D. fan failures and expense in connection therewith.

On the 10th, Adamek wrote pointing out that "Contract SC-1387" was not included in the "settlement made at your plant"; went on to explain that allowance had been made on the I.D. fan and asked Sandberg to confirm the elimination of Contract SC-1387 before the check was passed on to B&W's New York Treasury Department (Exhibit 2, App. Appellants' Brief, pp. 31-33). On the 11th Sandberg wrote that the reference to SC-1387 was in error and a check for it would be issued shortly (Ex. 3, App. Appellants' Brief, p. 33).

All was serene until Lumbermen's came

openly into the picture with the filing of the complaint here on March 29, 1963. (Tr. Vol. I, pp. 6-13). In due course each defendant answered separately denying knowledge or information sufficient to form a belief as to any payment made by Lumbermen's and affirmatively pleading that any claim for the fan failures was settled, satisfied and discharged by a compromise settlement entered into between Waldorf and B&W on or about September 11, 1962. (B&W Answer, Tr. Vol. 1, p. 17 lines 1-20); Clarage Answer, Tr. Vol. 1, line 25, p. 21 to line 12, p. 22). When these defenses were raised what had seemed a very clear "settlement" on September 11, 1962 became the subject to almost unbelievable equivocation and inconsistency when Sandberg's deposition was taken in resistance of a motion for summary judgment, based solely upon the admitted letters, on July 20, 1964.

Pursuant to stipulation of the parties, the Court segregated the "plea of settlement" for trial (Tr. Vol. I, pp. 31-32) on the pleadings, depositions of Sandberg and Adamek, answers to interrogatories, and the testimony of R. V. Mourer for defendants and such rebuttal as might be offered. Plaintiffs produced the testimony of Roy Countryman in rebuttal. On the record the trial court found to the effect that Waldorf and

B&W had in fact made a full settlement; concluded that the settlement with B&W also discharged Clarage (a matter apparently not disputed on this appeal) and entered judgment dismissing the complaint.

ARGUMENT

Introduction:

Appellants' counsel do lip service to the *Clark* theory of the "clearly erroneous" test, as they must in this Circuit, but this is prefaced by at least an under-emphasis of the live testimony. They then by pure *ipse dixit* characterize the result here as a "monstrous miscarriage of justice" and by every trick of advocacy seek to persuade this court to second guess the trial judge and thus, to serve their purpose emasculate rule 52(a) and the settled rule adopted in *Lundgren* v. *Freeman,* (C.A. 9—1962) 307 F 2d 104. They make no pretense of contending that there is not substantial evidence to support the trial court's findings, rather the thrust of their whole argument is that there is evidence and inference to the contrary and that "the reviewing court is really in as good a position as was the trial court to examine and consider the evidence on the issue in question". (Appellants' Brief, p. 7).

The fact is that this case was decided by the trial court on conflicting evidence. We think

that on every point the great preponderance of evidence, as distinct from argumentative speculation was with the Appellees and so we do not hesitate to meet Appellants head-on. Accordingly, we shall consider each of their four points in the order presented.

I. *The Writings, In the Context Under Which They Were Written, Clearly Establish A Settlement of the Fan Failures—If There was Any Ambuguity B&W's Understanding Prevails.*

A. *The Written Words.*

The idea that the August meeting wasn't had to settle everything is contrary to all that was ever written before the conference. Adamek's letter of March 27th (Exhibit "B", Sandberg Dep., p. 44) refers to Contracts Pr-58 and PFI-2799, mentions the fan failures and then suggests a meeting to "discuss and review whatever items have been tabulated" and suggests a meeting early in April. Sandberg, in his letter of April 10, 1962 (Exhibit "D", idem., p. 45) says, "We cannot be in a position to intelligently discuss *all the issues* involved for another 30 days". Later in the same letter he speaks of "all of the adjustments due us" and "any back charges and adjustments they feel are in order". Later on he says, "We are anxious to bring this matter to a close". Adamek replies on April 12th (Ex.

"E", idem., p. 47), "Re: Contracts PR-58 & PFI-2799" "After you have had an opportunity to analyze with your operating personnel any back charges and adjustments that they feel are in order". In the letter of June 4th, (Ex. "F", idem., p. 48), Adamek repeats "any back charges and adjustments that you feel are in order".

Sandberg's letter of June 19, 1962 (Ex. "G", id., p. 46) is particularly significant. He apologizes for the delay caused by "so much on the fire" and vacations:

> ". . . that I have not had an opportunity to attempt to finalize our ideas as to the adjustments we feel would be in order.
>
> * * * * *
>
> "I will make every effort to get our people out there together to see if we can come up with a proposal. In any event, I will get in touch with you when I return here on June 28th."

If, as Appellants now contend, the settlement was to cover only black and white invoices arising out of the construction—where is there room for finalizing "ideas on adjustments we feel would be in order" or coming up with a "proposal"?

The record is clear that R. V. Mourer of the Denver Service was the person who handled all of the matters arising out of the I.D. fan failures. Apellants would like to exclude him as a

principal, yet in his series of correspondence, Adamek was willing to accept some delay to have him present at the meeting (Telegram, Ex. "H", Id., p. 50).

On August 20 (Ex. "I", Id., p. 51) Adamek says he has advised "our people" to be present on August 28th to discuss the outstanding invoices, back charges, etc." Not once in this whole series of correspondence is it suggested that the conference exclude anything and the tenor of the whole clearly contemplates "power boiler" failures and the I.D. fan failures and outages.

Prior to the 7th day of September, 1962, Waldorf knew of the failure and knew of all of the apparent costs incurred by Waldorf in connection therewith. (Answer to Request for Admissions No. 2, Tr. Vol. I., p. 28).

On September 7, 1962 the admitted, outstanding and unpaid invoices for Contracts PR-58 and PFI-2799 amounted to $25,576.66. (Answer to Request for Admissions No. 5, Id., p. 29).

On September 7, 1962, Waldorf mailed a check to B&W in the amount of $12,788.00. (Ex. 1, attached to Request for Admissions following Tr. Vol. I, p. 27). This check was sent to bring "this account to a close." The term "this account" has reference to the first sentence of the

letter which says "regarding the settlement of our account with you on contracts SC-1378, PR-58 and PFI-2799 and our purchase order 2220." (Ex. "A" attached to the Sandberg Dep., p. 43, is the purchase order resulting in B&W Contracts PR-58 and PFI-2799). It is conceded by all that the reference to SC-1387 was in error and was corrected by the subsequent correspondence. This check was accepted by B&W, and it is the defendant's position that at that moment all of the charges and counter charges arising out of Contracts PR-58 and PFI-2799 were settled. In the ordinary meaning of words an account is not brought "to a close" while there are still controversies about it.

While it is conceded that there was a settlement of some kind, plaintiff contends that the settlement did not embrace the amounts due to Waldorf on account of the fan failures. Defendant takes the position that the letters in and of themselves conclusively show that the settlement did include the fan failures.

There is no suggestion in the letters that the settlement of Contracts PR-58 and PFI-2799 was anything less than final. There are no specific words leaving anything out of the settlement. As we read them, the letters indicate that if anything was settled, it was the fan failures.

These are Sandberg's words:

"You have refused to consider any allowance for Waldorf-Hoerner labor and supervision; travel expense of the writer and Waldorf, St. Paul engineering staff, Westinghouse and Clarage Fan Company servicemen's labor and material to restore the #2 I.D. fan and drive after two complete failures (the first one occurred within the one year warranty period.) We estimate that this amounts to about $50,000 in round figures; not making any allowance for the loss of production."

"We could hardly be expected to consider this settlement satisfactory; however, we do not wish to carry on this negotiation any longer; therefore, we reluctantly have approved the payment of $12,788.00 (this is the balance after deducting the expenses listed above from the outstanding invoices) to bring this account to a close."

(Letter, Sept. 7, 1962, Ex. 1, App. Apellants' Brief, p. 30).

If Sandberg says anything, he says that he doesn't like the settlement because he didn't get allowance for the fan failures, but certainly the letter does not exclude them from the settlement.

Before cashing the check, B&W wrote Waldorf. (Ex. 2, App. Appellants Brief, p. 31-32). The language of the B&W letter is "the amount agreed upon for Contracts PR-58 and PFI-2799." These words are general and embrace the whole of the contracts mentioned. They do

not exclude the fans or any other item. Again the letter says:

> "The total of our outstanding invoices on PR-58 and PFI-2799 amounts to $25,-576.00. The amount decided upon to settle these invoices was $12,788.00, or just half of the above total figure."

How do we settle an invoice? We take the contract price and deduct from it the amount which the parties agree that Waldorf shall get by way of credit for its claims. There are no words of limitation here. Then B&W makes it abundantly clear that the fan failures are embraced in this settlement. B&W tell Sandberg that he got more for the fan failures than he admits:

> "In reference to the last paragraph on page 1 of your letter you mentioned that we had refused to consider any allowance for Waldorf-Hoerner labor and supervision, travel expense for yourself and Westinghouse and Clarage fan servicemen for labor to restore induced draft fan on PR-58. This, I am sure is not altogether correct as we have given an allowance for Clarage service of $620, balancing expert and instruments $700, outside machining of fan shaft $350, rebabbit bearings and machining $400."

Then in Item No. 5, B&W shows credits of $3,078.00, all attributable to fan failure.

Then to further convince Sandberg that the settlement was good and that he had received something for the fan failures B&W says:

"Along with the above, we took care of the repair and straightening of your induced draft fan shaft in the sum of $1500. We furnished for the induced draft fan on your Recovery Boiler two new heavier retorts made of Corten material amounting to $7,-165.00."

Appellants now contend that the District Court paid no attention to Sandberg's words "for the completion of the contract" in Exhibit 1, and say that Sandberg was referring only to "expenses incurred before the new installation ever got into operation" as distinguished from warranty and product failures arising after operation began. Such argument is ingenious but it just will not hold water. As will be developed presently, each of the parties to the settlement made up their own specific items for the purpose of explaining the $12,788.00 split. However, that may be, appellants just cannot get away from the fact that Sandberg's itemization (assisted by Countryman) of six items specifically does include two that unquestionably involved so-called product failures or warranty responsibility.

First, the item:

"Convert 11 soot blowers to motor drives . . . 4,180.00". Everybody agrees that the air driven soot blowers did not prove satisfactory *in operation,* particularly because of a defect in the drive mechanism and so were replaced.

Countryman, Tr. Vol. II, p. 57, line 7-11;

Adamek Dep. line 15, p. 22—line 6, p. 24;

Mourer completely dispels Appellants' argument when he explains:

"A. They were initially installed—they were of standard design made by the Diamond Power Specialty Corporation, and they were of a new design which was being supplied at that time. On the older unit, they were of older design which had been very satisfactory and they were installed properly and the unit was operating and these changes on these soot blowers occurred some months after the unit was started up. In fact, their changes in the soot blowers fell pretty much in line when we were having ID fan problems. So the soot blower changes occurred after the unit was in service, because the problem was not that it didn't operate, they just required excessive maintenance and the same thing with the fan. You might say the blade stripping off the rotor required excessive maintenance so they could operate, and so they both were in the same category." (Tr. Vol. II, p. 37-38).

Second, Sandberg specifically listed as his last item:

"Allowance for replacement of ID fan expansion joint. . . . $2,377.69".

Adamek listed the same item on Exhibit 2, but he

allowed only $900.00. Sandberg concedes that this is a place where he might have juggled figures to come up with the even 50% split (Sandberg Dep., line 17, p. 30—line 12, p. 31). In all events, there isn't any question but that the expansion joint in the very ID fan installation here in controversy was a product failure. Whatever technical interpretations counsel may now place on Sandberg's letter, he stated in his deposition:

> ". . . and the last item on there is a replacement of the suspension and expansion joints that B&W finally admitted that it was the wrong design and we replaced it at our expense." (Sandberg Dep., p. 17, lines 11-14).

Countryman explains that the expansion joint corroded out in a matter of six to eight weeks when it should have lasted for at least five years. (Tr. Vol. II, p. 58, line 24—p. 59, line 7). There is no question but that all claims on the soot blowers and expansion joint were settled once and for all; both items failed after the plant went into operation and during the warranty period. No amount of argument or interpretation of Sandberg's words can make those failures any different in type or kind from the fan failures.

Counsel further seems to argue that when Sandberg listed his six items of credit in Ex-

hibit 1, that he "thus bracketed the payment he was making" and cites the general statute to the effect that the debtor may designate to the creditor the application of his payment. Such argument loses its effect when in a later connection counsel argue that in reality Exhibits 1 and 2 are the internal accounting records of the parties (Appellants' Brief, pp 24-25).

It is clear that the $12,788.00 figure did not represent specific items. It was a lump-sum figure reached by dividing the invoices in half. In Exhibit 1, Waldorf got a total of $12,788.00 with one set of figures. In Exhibit 2, B&W justified the same total with a wholly different set of figures. The figures on Exhibit "Y", the Countryman Memo, are not even the same as those appearing on Sandberg's list in Exhibit 1.

What did the lump sum settle? Adamek used this language:

> "I took our invoice, the total invoices, divided it in half and asked Mr. Sandberg, 'How about this split here and just call this thing quits?', and he said 'Okay' and that resulted in writing those letters."
>
> (Adamek Deposition, p. 18).

"Q. But I mean as far as closing out PR-58 and PFI-2799 was concerned, that closed the books?

"A. That's right.

"Q. On these original invoices?

"A. On all that we had discussed.

"Q. These invoices that are referred to here in his letter of September 7th?

"A. Those invoices plus anything else that had been discussed at the time, our service department or Mr. Sandberg, we had split this in half, 'You close your books. We'll close ours.' "

(Adamek Deposition, p. 22).

Even Sandberg admits that the items in his letter of September 7th had no particular reference to the whole controversy:

"Q. Let me ask you this, now. This $12,788.00 figure was arrived at first as a compromise and exactly one-half of the amount of outstanding B&W invoices on those two contracts?

"A. It was arrived at as I recall, as the matter of settlement and negotiation on the invoices. It was a matter of settlement and, as I recall, had no reference to the particular items involved in here.

"Q. That is right, it wasn't. You weren't taking each item and juggling it back and forth; you picked a $12,788.00 figure to settle 'the whole ball of wax' is about what happened?

"A. I'm not sure. It is possible."

(Sandberg Dep., p. 31, lines 13-25).

The question here is what the parties had in mind when they made their lump-sum settlement

for the very reason that they were bogged down on specific items — not the arbitrary figures either party used to justify the lump sum. That is not to say that the several fan failure items listed by Adamek in his Item 5, Exhibit 2, and by Mourer in Exhibit "X" are not persuasive— they are because they show the intention of the parties and are the promptly recorded recollections of Adamek and Mourer as to the general subjects which were involved in the settlement discussion of August 29. Just as Sandberg's two whole paragraphs on the fan failures in Exhibit 1 show conclusively that they were contemplated in the settlement by him. (Note that Countryman believed the first fan failure was a "back charge" (Tr. Vol. II, p. 22, lines 4-9)).

B. *If there be any ambuguity, Appellants are bound by what Sandberg knew he had led Adamek to believe.*

The evidence is clear that no one ever stated that the fan failures were to be excluded from the settlement. Adamek testified:

> "Q. When you say you had settled it half and half, did anybody suggest in your meeting in any words in the meeting itself that there was something left out of the settlement?
>
> "A. Not to my knowledge."
>
> (Adamek Deposition, p. 48).

Mr. Countryman conceded that his own

mental reservations as to the fan failures were not communicated to Adamek or Mourer, either by him or by anyone else (Tr. Vol. II, p. 63, line 14—p. 64, line 3).

Sandberg, of course, stoutly maintains that fan failures were not even mentioned at the meeting on August 29th, but had real difficulty explaining why he devoted two whole paragraphs to them in his letter written within 10 days after the conference. He said:

"Q. And you told me, I think you said a moment or so ago in response to a question that you can't now recall just what was in your mind at the time of this September 7th letter; is that correctly quoting you?

"A. I certainly had in mind the failure of the fans but my reason for inserting this particular paragraph in there, I don't recall."

(Sandberg's Deposition, p. 36, lines 2-8).

When he read Adamek's letter of the 10th he knew that Adamek had fan failures in mind because many of the items, and particularly Item 5, could relate to nothing else (Sandberg Dep., p. 38, line 10 to line 10, p. 40). He then admits:

"Q. So that you knew when he wrote you back with his letter of September 10th that he was thinking in terms of these

fan failures, did you not?

"A. That is right.

"Q. So then, when you wrote your letter of September 11th, did you do anything in that to correct the misunderstanding that he had?

"A. No sir."

(Idem., p. 40, lines 11-18).

Even if there were nothing else, Section 93-401-21, R.C.M., of 1947 is controlling here. That section provides:

> "When the terms of an agreement have been intended in a different sense by different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

It doesn't matter what secret reservations Sandberg may have now conjured up, or had suggested to him, to avoid the effect of the settlement he made. The law just will not permit this kind of double dealing. The underlying morality of that rule is picturesquely stated by the Supreme Court of Montana in *Kintner, et al,* v. *Riggs,* (Mont. 1965) 408 P 2d 487 at 495, as follows:

> "Professor Wigmore, in his work on Evidence (3rd ed.) section 2466, submits a story taken from the works of Dr. Wm. Paley, Principles of Moral and Political Phil-

osophy, b. III, p. I, C.V., 'Promises', which well illustrates the situation. . . .:

> " 'Temures promised the garrison of Sebastia, that if they would surrender, *no blood should be shed.* The garrison surrendered; and Temures buried them all alive. Now Temures fulfilled the promise in one sense, and in the sense too in which he intended it at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was in conscience bound to have performed it.' "

II. *The Oral Testimony Bolsters the Writings as a Full Settlement.*

Appellants' treatment of this subject under the heading indicating that the "principals" testified there was no settlement of fan failures. At the outset let it be pointed out that while Adamek took the lead in the discussions with Sandberg he was not the principal representative of B&W in any instance where failures or problems after the commencement of operation were encountered. That was the sole province of R. V. Mourer who was at the conference to discuss such items. The Adamek deposition is very clear on this point as is the whole record. Appellants cannot by talking about principals or "carrying the ball" relegate Mourer's clear

fan failures, did you not?

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testimony that there was a complete settlement to a secondary position.

Appellants contend that *both* Adamek and Sandberg swear that they did not negotiate and settle the fan failures. The record does not support that bold assertion as to either man. As to Adamek, counsel really "hang their hat" on a single question and answer in the Adamek Deposition, disregarding all else in the deposition. It is true that Adamek was asked and answered:

> "Q. Let me ask you whether in the course of this meeting there in August of 1962 you and the service department and Mr. Sandberg undertook to discuss and negotiate out any liability of either your company or the Clarage Fan Company on the warranty for the induced draft fan or responsibility for the failure of the fan?
>
> "A. Not that I recall."
>
> (Adamek Deposition, p. 35).

It is obvious from his whole deposition that Adamek was misled or did not understand that carefully contrived trap question which involved more questions of law than it did fact. For example, only a few moments before, Adamek had been asked and answered:

> "Q. Now, at this same meeting did you discuss the matter of responsibility for the failure of these induced draft fans?
>
> "A. I'm sure our service department did be-

cause they supplied free of charge two new wheels for the fan."

In terms of fan "failure", as distinct from the technicalitities of warranty, Adamek testified on his cross-examination:

"Q. Do you remember whether anything was said with respect to the failure of the induction draft fans?

"A. I'm sure that we discussed at that time, or it was discussed at that time the trouble they had had with the fans.

"Q. Were these discussions largely between you and Mr. Sandberg or between Mr. Mourer and Mr. Sandberg?

"A. They were mostly between Mr. Mourer and Mr. Sandberg.

"Q. As of the time of that meeting did you yourself have any intimate knowledge of the various failures and the various charges and counter-charges which were being discussed?

"A. I knew of the failures but not charges or moneys or anything involved.

"Q. Were Mr. Mourer and Mr. Sandberg in agreement about where the responsibility of Babcock & Wilcox for various items was?

"A. It appeared to me they were."

(Adamek Deposition, p. 42).

Further at page 44:

"Q. Now, does that recall anything to you with respect to the conversation between Mourer and Sandberg as to

whether or not they had discussed the responsibility for the fan failures at your meeting?

"A. I can't recall any specific statements or any thing, but the responsibility for the fan failure, since it happened within the one year period and we have a one year warranty on material, is definitely Babcock & Wilcox's responsibility to replace it.

"Q. Yes, but was there a discussion about this?

"A. I can't recall.

"Q. Was there a discussion about what the service department had done toward replacing this?

"A. Yes, there was.

"Q. Was that part of the August meeting?

"A. That was a part of the August meeting."

(Idem., line 22, p. 44 to p. 45, line 12).

It is to be noted that counsel for the Appellants set forth the above testimony on pages 18 and 19 of their brief down to the "I can't recall" answer but apparently deliberately seek to distort the whole meaning by the purposeful omission of the last two questions and answers.

Finally, the whole substance of Adamek's version of the August meeting and the settlement reached is summed up in the sworn deposition,

likewise carefully ignored by counsel, as follows:

"Q. What were your words as nearly as you can remember them?

"A. Something on this order: 'We've been going on for a day and a half here and we seem to have not come to any settlement yet. I would like to suggest that why don't we take the amount of our invoices and we'll split it in half and if it's agreeable with you it's agreeable with us, and we'll close this thing off.'

"Q. When you say close it off you were talking about what contracts?

"A. I'm talking about the meeting held for PR-58 and PFI-2799.

"Q. And one of the things that you knew about and one of the things that Sandberg knew about with respect to the PR-58 at that time was the fact that the fans had failed, was it not?

"A. Oh, that was our knowledge, everybody's knowledge.

"Q. And included in your acceptance letter there are credits given to them on account of those fan failures, are there not?

"A. That's true."

Sandberg's deposition was, of course, taken after Lumbermen's had come into the picture and learned of the settlement that had been made. It is true that Sandberg did deny the settlement on his sworn deposition but that doesn't mean that the trial court had to believe him,

especially when he just could not square the contents of his letter of September 7th, written before Lumbermen's entry, and his testimony after the insurance company came in. For example, Sandberg said:

"Q. Let me put it this way, didn't you and Mr. Adamek and Mr. Mourer agree on a figure of $12,788.00 and then set out to justify it somehow?

"A. I don't think so. I think these figures are exact."

(Sandberg Deposition, p. 30).

If Sandberg knew anything, he knew that the $12,788.00 figure was not exactly anything. In Exhibit 1, he managed to come up with a $12,-788.00 figure. But his figure did not embrace the items Countryman says were discussed, and even when the same items are mentioned the figures are not the same. (Compare Exhibit 1 and Exhibit "Y").

Sandberg says, referring to his letter:

"Q. So, when you said that 'we could hardly be expected to consider this settlement satisfactory', you were saying, ' it is not satisfactory in light of the money that you had expended in connection with the No. 2 ID fan'; isn't that so?

"A. No, sir, that is not so.

"Q. All right, tell me then what that language meant?

"A. It meant that the settlement for the power boiler that they refused and the other items that B&W had refused to consider as their responsibility."

The power boiler failure was not mentioned in the letter. Yet he says that is what he was complaining of.

Then, he says that they drove a hard bargain (Dep., p. 30, lines 9-12) and that this again referred to the not-mentioned power boiler. Then he finally gets around to the idea that the fan failures were not settled because they were not mentioned in the August 29th meeting (Dep., p. 34, lines 12-15), but at the same time he admits that the letter related not only to the August conference but to matters which had been previously discussed. (Dep., p. 29, lines 26-30).

At one time Sandberg admits the possibility that he settled the whole controversy.

"Q. Let me ask you this, now. This $12,-788.00 figure was arrived at first as a compromise and exactly one-half of the amount of outstanding B&W invoices on those two contracts?

"A. It was arrived at as I recall, as the matter of settlement and negotiation on the invoices. It was a matter of settlement, and as I recall, had no reference to the particular items involved in here.

"Q. That is right, it wasn't. You weren't taking each item and juggling it back and forth; you picked a $12,788.00 fig-

ure to settle 'the whole ball of wax' is about what happened?

"A. I'm not sure. It is possible."

(Deposition, p. 4, lines 13-25).

At one point he says that he settled all of the controversies.

"Q. Now, you are talking about a settlement in the first sentence; are you not?

"A. That is right.

"Q. Where they cut down their bill $12,-788.00 and you pay them $12,788.00 to settle all the controversies between you on PR-58 and PFI-2799. Isn't that what you said in that paragraph and isn't that what you meant?

"A. As far as the contracts, this is settlement of the two contracts, yes.

"Q. And you had in a previous paragraph mentioned the ID fan failures, the loss in production, you had mentioned allowances for Waldorf-Hoerner's labor, travel expenses, Westinghouse and Clarage service in repairing the two ID fans; had you not?

"A. Yes.

"Q. You were conscious of the cost of the repair and of those fans, were you not?

"A. I was conscious of it, yes.

"Q. And you also were aware that the failures or that the first failure had occurred within the warranty period, were you not?

"A. Yes."

(Deposition, p. 32, lines 5-26).

Then Sandberg says that the mention of the fans in his letter is a mistake, because nothing was said in the conference about fan failures (Dep., p. 34, lines 6-15); then concedes that the letter references were to the fan failures, (Dep. 34, lines 27-30), and finally winds up saying that he didn't know what he was doing.

> ". . . just what consideration I was giving to the liability of B&W at the time, I, when I approved these invoices, I don't know. I don't recall exactly."
>
> (Deposition, p. 35, lines 14-16).

"Q. And you told me, I think you said a moment or so ago in response to a question that you can't now recall just what was in your mind at the time of this September 7th letter; is that correctly quoting you?

"A. I certainly had in mind the failure of the fans but my reason for inserting this particular paragraph in there, I don't recall."

(Deposition, p. 36, lines 2-8).

On the other hand, Mourer, who appellants would like to ignore, gives a very clear and reasonable explanation of the very matters covered in the conference which Sandberg, in Exhibit 1, complained were not allowed in "this settlement" (Tr. Vol. II, p. 17, line 15 to p. 18, line 22) and is explicit that the whole purpose of the

meeting was "to settle all outstanding differences" so B&W could be finally paid (Id., p. 11, lines 9-22).

III. *Substantial Consideration.*

Appellants' argument here is that reducing Waldorf's obligation by one-half to the tune of $12,788.00 is not enough to make a settlement likely. All this amounts to is a repetition of Sandberg's protest made at the time, "We could hardly be expected to consider this settlement satisfactory; etc."

At the outset, let it be clear that when Appellants talk about $50,000.00 of liability they are talking about a demand in a complaint. When counsel talk about $29,267.00 being not practically in dispute, they are greatly in error; the fact is that on the merits of the claims Appellees have denied legal responsibility and liability for even $1.00. The whole argument of contrasting a claim in large figures with a comparatively small settlement can be compared to the personal injury claimant demanding several hundred thousand dollars for a mild whiplash.

Whatever Waldorf may have spent, or claimed to have lost, was not the question—the question in these negotiations was only how much B&W might be legally responsible for under its warranty or otherwise. The fact is that all we

know of the warranty is what is set forth in the complaint, ie., B&W would repair and replace within one year any equipment which was defective in design, workmanship or material (Complaint, par. III, Tr. Vol. I, pp. 7-8). That warranty did not, as Mourer pointed out, include a lot of overtime costs in making speedy repairs (Tr. Vol. II, p. 18).

It is apparent from the record that this product liability or warranty claim was doubtful and disputed and was so considered by both Sandberg and Countryman. Sandberg testified that he knew as much about the cause and responsibility for the claim on September 7, 1962 as he knew when his deposition was taken after this suit was filed; there was much discussion and speculation as to the reason for the fan failures but that had never been really determined; he had taken the position that B&W was responsible (Dep., pp. 25-27) but as to actually pinpointing responsibility he testified:

> "A. Well, I would—responsibility to Waldorf — I don't see how I can make a statement that they are responsible if I don't know the reasons for it. So I can't see that I can accurately place the responsibility without knowing more, without having more certain facts of actually what happened."
>
> (Deposition, p. 27, lines 11-16).

Countryman doesn't fix responsibility either (Tr. Vol. II, pp. 59-60); he describes several things, some of them as likely to be caused by the method of operation as by any deficiency in the fan; then seems to settle upon defective operation of washing equipment and winds up:

> "A. You see, I can't make a flat statement that the fan failure was definitely attributable to this one item, nor do I think anyone else can, you see, because there were several factors that contributed to the fan failure."
> (Tr. Vol. II, p. 61, lines 2-6).

It follows that the two men who represented Waldorf knew in their own minds that maybe it really didn't have much of a claim for the fan failures. Who, other than the negotiators themselves, is to say what is "substantial" on a doubtful and disputed claim? In addition to foregoing one-half of the balance due, B&W supplied two Corten rotors for the fan costing $7,165.00, paid $1,500.00 to straighten the fan shaft and paid the C. C. Moore bill for $3,236.72 (Exhibit 2)—a total of nearly $12,000.00 additional to cutting its contract debt in half.

The fact that Lumbermen's has now come on the scene, or that a substantial insurance payment, unknown to B&W, may have softened Sandberg in his demands does not change the fact that Sandberg did rather quickly snap-up Adamek's

50-50 offer.

The consideration for an accord and satisfaction need not be adequate. *Brent* v. *Westerman*, D.C. Mo., 123 F. Supp. 835.

IV. *There Is Nothing Incredible About the Transaction.*

Appellants seem to argue that there just couldn't be a settlement in the absence of the insurance company. The great fallacy of that argument, at least so far as B&W is concerned, is that there was no knowledge or notice whatsoever of any insurance payment or any subrogation rights. The one issue before the trial court was whether Waldorf had made a settlement. In the posture of this case Lumbermen's must stand and fall with Waldorf. When the settlement defense was raised Lumbermen's did not come in, as it might have if it thought the facts warranted, to show that the pleaded settlement had been made to defraud the insurance company or that it was made with notice or knowledge on the part of B&W that subrogation rights had attached. Such was not done. Indeed, counsel have been strangely coy about the whole insurance matter and on the record here we don't even know *when* Lumbermen's made its payment. All the complaint says is that as of March 29, 1963 Lumbermen's "has paid Waldorf." This is over six months after the critical time.

If we follow the lead of Appellants' counsel and apply Nizers rule of probabilities as a guide to the truth, then, actually the belated appearance of Lumbermen's has a tendency to explain many things. It completely dispels the substantial consideration argument because if Sandberg knew that Waldorf had been paid or would be paid by the insurance company, then in his position in August and September of 1962 the fifty per cent concession obtained by just dragging his feet was pure velvet. Counsel mention that no facts were assembled or discussed in detail. This is true of Sandberg both at the March and August meetings. It is not true of Adamek and Mourer and the latter made it very plain that he was prepared and would have "gone down item by item all the way through to the bitter end." (Tr. Vol. II, p. 31).

It also explains Sandberg's desperate equivocation and confusion. If, without the knowledge of Adamek, Waldorf had already been paid for the fans or even expected to be paid by its own carrier, then Sandberg believed he was really making a very shrewd and clever business deal when he got a chance to settle for half of his indebtedness. After dragging the matter for nearly two years, as his correspondence with Adamek will indicate, he really "snapped up"

Adamek's hesitant and very tentative suggestion in frustration that they just cut the bill in half. Only after the suit was filed and the defense raised did he find that the insurance company was quite unhappy and he was forced to evade and explain the damning paragraphs in his letter written within ten days after the August meeting.

If, as counsel assert, there has been a "monstrous miscarriage of justice" which "shocks the conscience" that was all engineered by Sandberg and he and Waldorf should bear the consequences. We again emphasize that however unfortunate Lumbermen's position may be it arose because it either slept on its rights or paid without proper inquiry—in all events, its rights or equities are no greater than Waldorf's.

CONCLUSION

We most sincerely urge that the trial court's findings and judgment are not "clearly erroneous" and that under the rule adopted by this Court it may not second guess the trial judge. Furthermore, on the record here, the evidence so greatly preponderates in support of the trial court that it really could arrive at no other result. B&W settled all claims for the fan failures with Waldorf as of September 11, 1962 and the fact that Lumbermen's is now in the picture does not change that result, or its consequences.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....
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